

## **ADVISORY OPINION 2006-004**

**Any advisory opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is required. KRS 121.135(4).**

June 15, 2006

Amy D. Cubbage  
Frost Brown Todd LLC  
400 West Market Street, 32<sup>nd</sup> Floor  
Louisville, Kentucky 40202-3363  
Fax: (502) 581-1087

Dear Ms. Cubbage:

We received your written request for an advisory opinion on May 19, 2006, on behalf of your client, the Partnership for Commonsense Justice, Inc. ("PCJ").

In your request, you provided us the following facts: PCJ is a Kentucky non-profit corporation that is exempt from federal income taxation pursuant to Section 501(c)(4) of the Internal Revenue Code. The purpose of PCJ is to promote social welfare and educate the public concerning the Kentucky judiciary.

PCJ intends to engage in mass media communications during the 2006 fall election cycle that may clearly identify certain candidates for the state offices of Supreme Court Justice, Court of Appeals Judge, Circuit Court Judge, or District Court Judge. None of these communications will include words clearly constituting "express advocacy," such as "vote for," "elect," "vote against," or "defeat."

Accordingly, you have raised the following questions concerning these mass media communications:

- (1) Based on the above facts, and assuming that PCJ does not engage in “express advocacy,” would any conduct proposed by PCJ be prohibited by the ban in KRS 121.035 on the use of corporate funds “for the purpose of aiding, assisting, or advancing any candidate for public office” or any other ban in KRS Chapter 121 on the use of corporate funds in Kentucky elections?

Under Section 150 of the Kentucky Constitution, KRS 121.025, and KRS 121.035, a corporation is prohibited from contributing, directly or indirectly, or otherwise giving anything of value to a candidate for public office in Kentucky. In addition, KRS 121.150(21) prohibits a candidate or committee from accepting a contribution from a corporation, directly or indirectly. The prohibitions against making and receiving corporate contributions apply to both monetary and in-kind contributions.

However, as discussed in more detail in KREF Advisory Opinions 2006-001 and 2006-003, the Registry has limited regulatory authority over political communications pursuant to Buckley v. Valeo, 424 U.S. 1 (1976). The protected First Amendment rights are not diminished merely because the issue advocacy emanates from a corporate entity. As quoted in Kentucky Registry of Election Finance v. Louisville Bar Association, 579 S.W.2d 622, 627 (Ky.App. 1978):

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.

The activity that PCJ proposes – expending corporate funds on mass media communications which do not expressly advocate the election or defeat of any judicial candidate – would not fall within the regulatory jurisdiction of the Registry. Therefore, provided the proposed communications do not go beyond issue discussion to express electoral advocacy and PCJ does not otherwise give any money, service, or value to any candidate, PCJ would not be in violation of KRS 121.025, KRS 121.035, or Section 150 of the Kentucky Constitution.

- (2) Based on the above facts, and assuming that PCJ does not engage in “express advocacy,” would any conduct proposed by PCJ subject it to regulation as a “permanent committee” as that term is defined in KRS Chapter 121?

KRS 121.015(3)(d) defines a permanent committee as:

a group of individuals, including an association, committee or organization, other than a campaign committee, political issues committee, inaugural committee, caucus campaign committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose expressly advocating the election or defeat of one (1) or more clearly identified candidates, slates of candidates, or political parties, which functions on a regular basis throughout the year.

(Emphasis added.)

Based on the facts provided in your request, the mass media communications in question would not explicitly call for the readers or viewers to vote for or against a clearly identified candidate. Therefore, the communications proposed by PCJ do not expressly advocate the election or defeat of a candidate as set forth under Buckley and would not fall within the constitutionally-limited circumstances under which the Registry may regulate political speech. So long as the advertisements described in your request do not extend beyond issue discussion to express electoral advocacy, PCJ would not be subject to registration and reporting as a permanent committee based solely on the described communications.

- (3) Based on the above facts, and assuming that PCJ does not engage in “express advocacy,” would the proposed communications by PCJ constitute “independent expenditures” as that term is defined in KRS Chapter 121?

KRS 121.015(12) defines an independent expenditure as:

the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them.

(Emphasis added.)

As discussed above, the proposed mass media communications would not expressly advocate the election or defeat of a candidate as set forth under Buckley. Accordingly, the payments for such communications would not constitute independent expenditures as defined under KRS 121.015(6) and PCJ would not be subject to the reporting requirements of KRS 121.150(1).

- (4) Based on the above facts, and assuming that PCJ does not engage in “express advocacy,” would any conduct proposed by PCJ subject it to regulation under Kentucky’s disclaimer statute, KRS 121.190?

KRS 121.190(1) provides, in relevant part, that:

[a]ll newspaper or magazine advertising, posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements, which expressly advocate the election or defeat of a clearly identified candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words “paid for by” followed by the name and address of the individual or committee which paid for the communication; except that if paid for by a candidate, slate of candidates, or campaign committee, it shall be identified only by the words “paid for by” followed by the name of the candidate, slate of candidates, or campaign committee, whichever is applicable.

(Emphasis added.)

Since the proposed mass media communications would not expressly advocate the election or defeat of a candidate as set forth under Buckley, PCJ would not be subject to regulation under Kentucky’s disclaimer statute of KRS 121.190(1). However, please keep in mind that television or radio announcements must also comply with the Federal Communication Commission’s statutes and regulations.

- (5) Do the Registry Staff Report in *Sandy Jones v. Alan Baker, Thomas Baker and Citizens for Honest Government*, Case No. 2004-207 (Adopted by Board Order dated August 26, 2005) and Registry Opinion 2006-001 represent the Registry’s current interpretation of the meaning of the phrase “express advocacy”?

As discussed in more detail in KREF Advisory Opinions 2006-001 and 2006-003, the Registry has confirmed that the “express advocacy” standard as set forth under Buckley is the proper standard for analysis of the disclosure and reporting requirements under KRS Chapter 121. In Buckley, the U.S. Supreme Court construed the expenditure limitations and disclosure and reporting requirements under federal law “to reach only

funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” Buckley, 424 U.S. at 80. To avoid vagueness and overbreadth, a bright statutory line was established to separate “express advocacy” from “issue advocacy.” McConnell v. Federal Election Comm’n, 540 U.S. 93, 126 (2003). Under this bright-line test, the Court identified examples of certain “magic words” that are essential in determining express advocacy, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or “reject.” Buckley, 424 U.S. at 44, fn 52. Subsequent cases have consistently limited the regulation of political speech to those expenditures constituting express advocacy. See e.g., First National Bank of Boston v. Belotti, 435 U.S. 765 (1978); and Federal Election Comm’n v. Massachusetts Citizens For Life, 479 U.S. 238 (1986). Communications which do not constitute express advocacy, as defined by this test, are considered constitutionally-protected First Amendment speech and may not be subject to government regulation. This is based on the fact that “the government may not regulate a broader class of speech than is necessary to achieve its significant interest.” Anderson v. Spear, 356 F.3d 651, 665 (6th Cir. 2004).

- (6) Based on the above facts, would a mass media communication indicating that a judicial candidate has beliefs or values in apparent agreement with the beliefs and values held by PCJ members but which does not include any words such as “vote for,” “elect,” “vote against,” or “defeat” constitute “express advocacy” such that the communications would be regulated by the Registry and KRS Chapter 121?

As described, the proposed mass media communications would not explicitly call for the readers or viewers to vote for or against a clearly identified judicial candidate. Therefore, the communications proposed by PCJ do not expressly advocate the election or defeat of a candidate as set forth in Buckley and would not fall within the constitutionally-limited circumstances under which the Registry may regulate political speech. For that reason, provided the communications do not go beyond issue discussion to express electoral advocacy as illustrated in Federal Election Comm’n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), PCJ would not be subject to registration or reporting based solely on such mass media communications.

- (7) Based on the above facts, would a communication from either PCJ to its members or a trade association member of PCJ to its members indicating either that (1) a judicial candidate has beliefs or values in apparent agreement with the beliefs and values held by PCJ members but which does not include any words such as “vote for,” “elect,” “vote against,” or “defeat” or (2) that the judicial candidate has been endorsed by PCJ be regulated by the Registry and KRS Chapter 121?

The communications, as described, do not expressly advocate the election or defeat of a candidate as set forth under Buckley and, therefore, would not fall within the constitutionally-limited circumstances under which the Registry may regulate political speech. So long as the advertisements described in your request do not extend beyond

issue discussion, PCJ would not be subject to registration and reporting based solely on the described communications.

- (8) Is it permissible under KRS Chapter 121 for a permanent committee regulated by the Registry to make contributions to PCJ?

KRS 121.150(2) provides, in relevant part, as follows:

[T]he solicitation from and contributions by campaign committees, caucus campaign committees, political issues committees, permanent committees, and party executive committees to any religious, charitable, civic, eleemosynary, or other causes or organizations established primarily for the public good is expressly prohibited....

Therefore, under Kentucky law, a permanent committee is expressly prohibited from making a contribution to PCJ due to its structure as a 501(c)(4) tax-exempt social welfare organization. Further, please remember that the Registry's jurisdiction is limited to the application of the campaign finance laws under KRS Chapter 121. You may wish to seek further guidance from the Internal Revenue Service concerning any federal restrictions or prohibitions related to the tax-exempt status of the organization.

- (9) Is it permissible for PCJ to coordinate its activities with permanent committees or any other entity?

The definition of a "contribution" under KRS 121.015(6) specifically includes in-kind contributions which are:

[g]oods, advertising, or services with a value of more than one hundred dollars (\$100) in the aggregate in any one (1) election which are furnished to a candidate, slate of candidates, committee, or contributing organization or for inauguration activities without charge, or at a rate which is less than the rate normally charged for the goods or services...

Any expenditure made in cooperation, coordination or consultation with or at the request of PCJ would be considered an in-kind contribution made by the permanent committee to PCJ. As discussed in question (8) above, a permanent committee may not make a contribution, monetary or non-monetary, to a 501(c)(4) organization. Such in-kind contributions are also prohibited from campaign committees, caucus campaign committees, political issues committees, and party executive committees in accordance with KRS 121.150(2).

Ms. Amy D. Cabbage  
Advisory Opinion 2006-004  
June 15, 2006  
Page 7

Please keep in mind that this advisory opinion is based on the specific facts set forth in your written request. If you have any questions concerning this advisory opinion, please do not hesitate to contact the Registry. Thank you.

Very truly yours,

Connie L. Verrill  
General Counsel